

Prosecuting Saddam: The Coalition Provisional Authority and the Evolution of the Iraqi Special Tribunal

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Prosecuting Saddam: The Coalition Provisional Authority and the Evolution of the Iraqi Special Tribunal

Tom Parker†

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Introduction

Look, the Iraqis need to be very much involved They were the people that were brutalized by this man. He murdered them. He gassed them. He tortured them. He had rape rooms. And they need to be very much involved in the process.

President George W. Bush, December 15, 2003¹

With the fall of Baghdad to Coalition forces in April 2003 civilian authority passed from Saddam Hussein's ruling Ba'ath Party first to the Office of Reconstruction and Humanitarian Assistance (ORHA) headed by the former United States General Jay Garner and soon thereafter in June 2003 to the Coalition Provisional Authority (CPA) headed by Paul L. Bremer. Amongst the many pressing issues facing CPA administrators was the question of how to address the major human rights abuses and atrocity crimes allegedly committed by Saddam's regime. Within the CPA the responsibility for addressing the judicial and humanitarian issues arising out of these alleged crimes ultimately fell to the Office of Human Rights and Transitional Justice (OHRTJ).

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1. Vanessa Blum, *A Slow Search for Justice in Iraq*, *LEGAL TIMES* (Washington), Jan. 24, 2005, at 1.

Staffed initially by a mixture of U.S. and British civilian and military advisors, the OHRTJ's first objective was to gain some sense of what sort of reckoning process, if any, Iraqis favored—no easy task in a war shattered country with a majority of its population still unsure of how much it wished to interact with the occupying forces. OHRTJ staffers reached out to both the legal community and the plethora of newly minted local human rights groups, taking care to include representatives of all the major Sunni, Shi'a, and Kurdish political parties. This was perhaps not the most scientific approach but it was well suited to the rough and ready circumstances in which the CPA operated. Conferences and working groups were established to encourage the free flow of ideas and opinions between these groups.

Several key themes soon emerged. First, Iraqis of all backgrounds wanted Saddam and his lieutenants to face trial. This finding was confirmed by independent research conducted by the International Center for Transitional Justice (ICTJ) and the Human Rights Center at the University of California, Berkeley in July and August 2003.² Their report, *Iraqi Voices*, was based on "hundreds of hours of individual and focus group interviews" and revealed "a strong demand" for a judicial accounting process.³ A similar poll conducted by the Boston-based charity Physicians for Human Rights (PHR) in Southern Iraq in the summer of 2003 found that 98 percent of those questioned would like to see those responsible for major human rights abuses during the Saddam-era punished.⁴ Seventy-seven percent favored some form of legal process over summary executions.⁵

Second, after more than a decade of punitive sanctions and widespread rumors of venal corruption in the Oil for Food Program, the Iraqis did not regard the United Nations as an honest broker. There was little enthusiasm across the spectrum of Iraqi opinion for an international criminal tribunal established under the auspices of the Security Council like the International Criminal Tribunals for the former Yugoslavia and Rwanda or for the hybrid model pioneered by the Special Court in Sierra Leone. PHR's poll found that only twelve percent of respondents favored the international court option.⁶ Furthermore, the signals given off by the United Nations Assistance Mission for Iraq (UNAMI) suggested that the U.N. itself was likely to be somewhat reluctant to become involved in any such project.

Third, and finally, attempts to encourage interest in the truth and reconciliation model used so effectively in South Africa and elsewhere fell on deaf ears, partly because the word "reconciliation" had passive connota-

2. INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, ANNUAL REPORT 2003/2004 8 (2004).

3. *Id.*

4. PHYSICIANS FOR HUMAN RIGHTS, SOUTHERN IRAQ: REPORTS OF HUMAN RIGHTS ABUSES AND VIEWS ON JUSTICE, RECONSTRUCTION AND GOVERNMENT 2, 6 (2003).

5. *Id.* at 8.

6. *Id.*

tions in Arabic which Iraqis found distasteful. One cleric suggested to the CPA that "forgiveness" might have been a better choice of word with its empowering quality⁷ but the moment to stimulate interest in alternative transitional justice models had passed. The CPA continued to promote some form of "truth revealing process" as a possible parallel or second tier transitional justice mechanism but its efforts met with little success.

All the CPA's research pointed to the fact that Iraqis favored the creation of an Iraqi court that could try members of Saddam Hussein's regime for international crimes. This conclusion was echoed by the ICTJ's *Iraqi Voices* project: "Iraqi participants demanded an Iraqi-controlled process, but welcomed international assistance to ensure that the trials would be fair and unbiased."⁸ This was also the approach favored by the Iraqi Governing Council—the group of leading Iraqi opposition figures established by the CPA to act as a shadow Iraqi government.

Once it became clear that the Governing Council favored the creation of an Iraqi-led tribunal applying international law, the focus shifted to how to best support this process. Leading the Iraqi effort were Governing Council Member judge Dara Noor al-Din and acting general counsel to the Governing Council Salem Chalabi. Chalabi produced a first draft of a statute for the Iraqi tribunal which was largely derived from the Rome Statute of the International Criminal Court but also sought to address issues of particular concern to the Governing Council such as the damage done to the environment by Saddam's regime in draining the southern marshes and by setting oil wells ablaze during the retreat from Kuwait in 1991.

CPA advisers, notably the British military lawyer Charles Garraway, who had been part of the British delegation during the negotiations on the Rome Statute, worked closely with the council to prepare a statute for the tribunal which reflected the current state of international criminal law and was closely derived from existing international tribunal statutes. As a result of their labors, on December 10, 2003, the Governing Council announced the establishment of an Iraqi Special Tribunal (IST) to try major crimes committed under the former Ba'athist regime.⁹

I. Investigative Strategy

Iraq is what investigators like to call an evidence rich environment. The Ba'athist regime took little trouble to disguise its actions or deflect responsibility for alleged crimes away from the party leadership. Senior members of the regime are reported to have had a personal hand in acts of torture and killing. Some have boasted in public of the role they played in mass murder. In 1995, Human Rights Watch published *Iraq's Crime of Genocide*, a book-length report on the 1988 Anfal campaign which provides

7. See PUMLA GOBODO-MADIKIZELA, A HUMAN BEING DIED THAT NIGHT 117 (2003), for a discussion of the empowering nature of forgiveness.

8. INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, *supra* note 2, at 8.

9. Statute of the Iraqi Special Tribunal art. 38, Dec. 10, 2003, 43 I.L.M. 231, available at <http://iraqi-ist.org/en/about/statute.htm>.

an excellent guide to the type and scope of potentially incriminating material that exists inside Iraq.¹⁰

It should be emphasized that there is no shortage of such material. In the early 1990s approximately eighteen tons of Iraqi documents recovered by Kurdish forces and human rights investigators were shipped back to the United States for safekeeping where they were catalogued by a team from Human Rights Watch and the National Archives.¹¹ After the fall of Baghdad in 2003, local human rights groups and political parties raided government offices across the country and took the records they found into their care. The Baghdad-based Association of Free Prisoners claims to have eighteen million documents, mostly from the files of the Directorates of General Security and Military Intelligence, in its possession.¹² The Iraqi Communist Party established a Martyrs and Missing Persons Commission to acquire documents relating to the campaign waged against its members in the early years of the Ba'athist regime.¹³ Such initiatives are relatively commonplace in post war Iraq. In addition, the U.S. military has seized an estimated fifty million Iraqi government documents—albeit mostly related to suspected weapons of mass destruction programs—which are currently sequestered in Qatar for analysis.

The IST will also have to tackle the daunting task of recovering physical evidence from mass grave sites and collecting eyewitness and survivor testimony. By January 2004, 270 suspected mass grave sites had been reported to the CPA and the CPA had completed preliminary investigations of fifty-three of the sites.¹⁴ Investigators working with the IST began the first evidential exhumation of a mass grave site in October 2004 in the desert south of Mosul. More than 300 bodies were recovered from two trenches at the site, one of which consisted solely of women and children all shot execution-style in the head.¹⁵ The largest grave site discovered to date, located at Al Mahawil sixty miles south of Baghdad, is believed to hold as many as 15,000 bodies—approximately 3,000 have so far been recovered.¹⁶

The real challenge, as the United States Institute of Peace has pointed out, is to avoid being overwhelmed by all this data.¹⁷ The OHRTJ worked closely with Governing Council members and IST staff to illuminate the

10. HUMAN RIGHTS WATCH, *IRAQ'S CRIME OF GENOCIDE: THE ANFAL CAMPAIGN AGAINST THE KURDS* (1995).

11. William Langewiesche, *The Accuser*, *THE ATLANTIC MONTHLY*, Mar. 2005, at 78.

12. HUMAN RIGHTS WATCH, *IRAQ: STATE OF THE EVIDENCE* 12 (2004).

13. *Id.* at 9-10.

14. U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, *IRAQ'S LEGACY OF TERROR: MASS GRAVES* 2 (Ben Barber ed., 2004).

15. Jack Fairweather, *Full Horror of Saddam Unfolds: Investigators Unveil Iraqi Mass Grave Containing 300 Bodies*, *DAILY TELEGRAPH* (London), Oct. 14, 2004 at 1.

16. See ULRIKE LÖW, *ARCHEOLOGISTS FOR HUMAN RIGHTS, MASS GRAVE SITES IN IRAQ* 5 (2003); HUMAN RIGHTS WATCH, *THE MASS GRAVES OF AL MAHAWIL: THE TRUTH UNCOVERED* (2003).

17. LAUREL MILLER, UNITED STATES INSTITUTE OF PEACE, *SPECIAL REPORT 122, BUILDING THE IRAQI SPECIAL TRIBUNAL: LESSONS FROM EXPERIENCES IN INTERNATIONAL CRIMINAL JUSTICE* 1 (2004).

operational issues involved in such an immense undertaking. A Crimes Against Humanity Investigations Unit (CAHIU) was established within the OHRTJ to provide investigative and operational support to the tribunal in its initial stages because the professional capacity to support investigations of this magnitude and complexity did not yet exist locally. This unit evolved into the Regime Crimes Liaison Office (RCLO) after the CPA handed back control of Iraq to the interim government of Prime Minister Ayad Allawi in June 2004.

The priority for the CAHIU was to develop an investigative strategy to help the IST focus and prioritize its efforts effectively. The Governing Council had initially envisaged bringing some six thousand cases before the IST much in the manner adopted by the Allies after World War II.¹⁸ CPA advisors talked Governing Council members through the complexity of modern international criminal justice norms and noted that the International Criminal Tribunal for the former Yugoslavia (ICTY) is expected to take almost eighteen years to try a mixed bag of approximately one hundred cases at a cost of more than \$1.5 billion.¹⁹ CPA advisors suggested that the IST should instead follow the lead of the Special Court for Sierra Leone and impose a strict upper limit on the number of cases brought before it.²⁰ Otherwise without some limitation, trials could drag on for decades at great expense, diluting the meaning of the process and incurring a financial burden that the recovering Iraqi economy could ill-afford.

The CAHIU recommended that the investigative effort be limited to no more than twenty to twenty-five high-profile perpetrators. To establish the credibility of the process, the first Ba'athist regime crimes cases should address issues and involve individuals that are immediately recognizable to most Iraqis. Furthermore, the initial cases should broadly involve incidents that reflect the temporal and geographic spread of the regime's crimes such as the persecution of the Fayli and Barzani Kurds in 1980 and 1983, the attack on Halabja in 1988, the Anfal campaign in 1988, the occupation of Kuwait in 1990, the suppression of the post-Gulf War uprising known locally as the Intifada in 1991, the smaller Shi'a uprising in Basra in 1999, the persecution of the Marsh Arabs during the mid-1990s, and the systemic torture of political opponents throughout the Ba'athist era. As Martha Minow has observed: "Proper prosecutorial discretion generally reflects efforts to identify those most responsible or the most serious offenders."²¹

First CAHIU and then the RCLO worked to draw together files of incriminating material on likely indictees. Targets were chosen from among the so-called High Value Detainees (HVDs) already in Coalition cus-

18. See GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 203-05 (2000).

19. Guy Lesser, *War Crime and Punishment: What the United States Could Learn from the Milošević Trial*, *HARPER'S MAGAZINE*, Jan. 2004, at 44 n.14.

20. See M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 573 (2003).

21. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 31 (1998).

tody and were selected to reflect the hierarchy of culpability already identified by international human rights organizations such as Human Rights Watch and Indict, by fledgling Iraqi advocacy groups such as the Free Prisoners Association, and by former opposition parties such as the Iraqi National Congress, Iraqi National Accord, Patriotic Union of Kurdistan, and the Supreme Council for Islamic Revolution in Iraq. These cases have been developed in close consultation with IST staff and the materials will ultimately all pass to the Tribunal.

Prior to the fall of the Ba'athist regime the NGO Indict had already collected sufficient material to suggest a *prima facie* international criminal law case existed against a number of leading members of Saddam's regime, a group it labeled the "Dirty Dozen." Case files relating to these individuals were passed to the IST in November 2003 in a deal brokered by the U.S. Ambassador at Large for War Crimes Pierre Prosper and the Chair of Indict, the British Member of Parliament Ann Clywd.

II. Trial Scheduling

Serious consideration was also given to the order in which indictees should be brought to trial. There will inevitably be strenuous calls for Saddam Hussein to be put on trial first but, as U.S. Ambassador Richard Jones noted in a speech before Iraqi jurists in December 2003, there are compelling reasons for resisting these calls. The prosecution of Saddam will inevitably be the most complex and challenging of all the trials heard by the Tribunal, and as such, it would make a daunting curtain-raiser for Iraqi judges newly tutored but still relatively inexperienced in international humanitarian law and international notions of due process.

Furthermore, from an investigative and prosecutorial standpoint, the prosecution of Saddam will involve the greatest collection and collation of evidence of any of the trials. This inevitably means that the pretrial period would also be the longest of any of the cases under consideration. A decision to commence the IST process with the trial of Saddam would inevitably have the consequence of delaying the functional operation of the tribunal by as much as six months to a year. This would have a detrimental political impact on a community thirsty for justice and impatient for some evidence that progress is being made towards bringing senior Ba'athists to account.

For this reason CPA advisors recommended opening the trial with cases that, while significant, are essentially limited in their temporal or geographic scope to a smaller number of charges. This course of action would have the multiple benefits of an earlier start date for the tribunal; of meeting public demands to see high profile former regime figures on trial; of allowing judges, prosecutors, and defense attorneys to ease into their roles more gently; and of proving in court a significant body of crime based evidence that could then be rapidly recycled, and, where necessary, expanded for use in the trial of Saddam Hussein himself.

III. Local Capacity Building

One of the more innovative aspects of the IST approach is its focus on local capacity building. Restoring respect for the judiciary and the rule of law will be a key step in the stabilization and recovery of Iraq. It is difficult to imagine a more effective or symbolic manner in which this could be achieved than by Iraqi judges presiding over Saddam Hussein's trial. In addition, by empowering Iraqis to tackle this task themselves, the IST will be creating an experienced cadre of judges, lawyers, and investigators steeped in international notions of due process. When their tribunal work is finished, many will return to Iraq's still-fragile legal system, where they will be able to pass their skills on to their compatriots.

It has been fashionable in some quarters to suggest that Iraq, birthplace of the world's first code of laws, will be unable to produce jurists of sufficient competence and character to try complex regime crimes cases. It is certainly true that little emphasis was placed on international criminal law in the law schools of Saddam Hussein's Iraq. However, as the current head of the RCLO, Greg Kehoe, has observed, these are skills that can be learned.²²

In 1993 and 1994, when the United Nations created the ICTY and International Criminal Tribunal for Rwanda (ICTR), the ad hoc tribunals had to start from scratch. The corpus of international criminal law itself was unformed. Yet within a few years a legal superstructure was constructed with judges installed on the bench from societies as diverse as China, Turkey, and Guyana hearing cases argued before them by lawyers from Sri Lanka, South Africa, and the former Yugoslavia. Is anyone seriously suggesting that Iraqis are uniquely incapable of taking their place amongst such company? The reality is that there is no shortage of skilled legal professionals both in Iraq and amongst the Iraqi diaspora and a major effort has been launched to ensure that those participating in the IST process receive the legal training they require. Ultimately, as Christopher Greenwood observed, "it is patronising for lawyers in the rest of the world to leap to the conclusion at this stage that the Iraqis are incapable of staging a fair trial."²³

Other tangible benefits are the additions to the physical infrastructure of the Iraqi criminal justice system that will accompany the IST process. Courtrooms are being refurbished in preparation for the trial phase. A secure evidence storage facility has already been constructed in Baghdad with a state of the art electronic case management system. Iraqi investigators are being supplied with modern office equipment and training in Western investigative techniques. Iraqi forensic science students have been trained in England in the art of mass grave exhumation by the International Centre of Excellence for the Investigation of Genocide (INFORCE). One of the key strengths of this approach is that international funding is

22. Blum, *supra* note 1, at 14.

23. Christopher Greenwood QC, *Trying Saddam*, THE GUARDIAN, Dec. 17, 2003, at 21.

being spent where it will do the most good, not in The Hague or a neighboring capital but in Iraqi cities and on Iraqi staff.

IV. Community Outreach

If the IST is to win public trust and support for its efforts, it will be important that the investigative process is conducted in as transparent a manner as possible and that the public is kept as fully apprised as possible about the Tribunal's intentions. A televised judicial process conducted according to internationally accepted standards will become a civics class for the whole country, and Mr. Hussein's victims will at last have a chance to be heard in front of their own people.

CPA advisors proposed an integrated multimedia strategy with three broad objectives: i) explaining the tribunal process to the Iraqi public; ii) encouraging witnesses and those holding relevant evidence to come forward; and iii) reporting events occurring in court, especially key witness testimony. Many commentators have noted that the ICTY's failure to conduct effective outreach undermined its credibility in the Balkans while the emphasis the Special Court for Sierra Leone has placed on town hall meetings and openness in the local media has contributed significantly to its credibility in the region.²⁴

Michael Scharf has expressed concern that televising court proceedings—as the IST did Saddam Hussein's first appearance before an Iraqi judge in June 2004—could risk giving a platform to those on trial to reach out to their supporters and foment political unrest.²⁵ This is possible but unlikely. Iraqi judicial practice is based on the civil law model which does not afford the same opportunities for speechifying that one finds in adversarial systems such as that used by the ICTY. The judges will likely also exercise far greater control over proceedings than in a common law trial. With Slobodan Milošević's cautionary example very much in everybody's minds, one can confidently expect the IST judges not to tolerate willful attempts to disrupt their courtrooms.²⁶

An equally important outreach issue is the development of local psychological and social support structures to help victims come to terms with their experiences. These are relatively well developed in the Kurdish areas of Northern Iraq but are virtually nonexistent elsewhere in the country. The creation of such support can be an important factor in winning over the hearts and minds of local people and encouraging their participation in the investigation. As an experienced team of mass grave specialists commented after visiting Iraq in the summer of 2003: "Key to the success of any forensic investigation of the missing in Iraq will be the extent to which the

24. See MILLER, *supra* note 17, at 3.

25. See Michael P. Scharf, *Is it International Enough? A Critique of the Iraqi Special Tribunal in Light of the Goals of International Justice*, THE FREDERICK K. COX INTERNATIONAL LAW CENTER WAR CRIMES RESEARCH PORTAL, Feb. 9, 2004, http://www.law.case.edu/war-crimes-research-portal/instant_analysis.asp?id=6.

26. See MILLER, *supra* note 17, at 7-8.

families and their organizations are actively involved in efforts to locate, exhume, identify, rebury, and memorialize the dead.”²⁷

V. Victors’ Justice?

The IST will likely never escape from allegations that it amounts to no more than “victors’ justice.” From Nuremburg to The Hague, international criminal tribunals have been subject to allegations of this nature. The peculiar genesis of such tribunals ensures that they always represent the fruition of some form of political as well as judicial process.²⁸ The key issue is not that they have been brought into being to address a particular political need—surely by now this at least can hardly be that controversial—but how they discharge that commission. The key to answering cries of “victors’ justice” is to ensure that proceedings before the tribunal are conducted to the highest standards of due process and in accordance with international best practice. To this end the IST Statute provides defendants with fundamental rights including a presumption of innocence, access to counsel, a public trial, an adequate time to prepare a defense, a chance to present evidence, an opportunity to cross-examine witnesses, and a right to silence.²⁹ By enshrining such rights at the heart of the reckoning process, we can ensure that even if perceptions of “victors’ justice” endure at least there is also widespread acknowledgment that the true “victors” in this instance are the rule of law and the Iraqi people.

VI. The Death Penalty

Clearly one of the most controversial aspects of the IST is the fact that it will include capital punishment amongst its sentencing options. The penalties open to the IST are those set out in the Iraqi Criminal Code of 1969 and in operation in routine criminal proceedings throughout the country.³⁰ Although the death penalty was suspended for the duration of the CPA occupation, the Governing Council made it clear from the outset that they were determined that any proceedings brought before the IST would be subject to the full range of punitive sanctions envisaged under the 1969 Code. The interim government took the same line.

The issue of the death penalty became extremely problematic for a number of CPA partners, most notably the United Kingdom. The British government made an early determination that the probable inclusion of the death penalty would make it impossible for the United Kingdom to play a further active role in the establishment of the IST without risking being in

27. Eric Stover, William D. Haglund & Margaret Samuels, *Exhumation of Mass Graves in Iraq: Considerations for Forensic Investigations, Humanitarian Needs, and the Demands of Justice*, 290 J. AM. MED. ASS’N. 663, 665 (2003).

28. Dino Kritsiotis, *When States Use Armed Force*, in THE POLITICS OF INTERNATIONAL LAW 45, 75 (Christian Reus-Smit ed., 2004).

29. *Turmoil in Iraq, Transitional Arrangements, and the Capture of Saddam Hussein*, 98 AM. J. INT’L L. 190, 192 (Sean D. Murphy ed., 2004).

30. *Id.*

breach of its European Convention on Human Rights obligations.³¹ British officials pressed the Governing Council to reconsider the issue citing both moral concerns and the practical implications which would prevent the United Nations, European governments, and most international NGOs from assisting the tribunal's development. Once the IST statute was promulgated British staff members working for the FCO were withdrawn from advisory positions directly associated with the IST. A spokesman for Prime Minister Tony Blair commented after the transfer of power: "We have made clear our opposition to the death penalty but Iraq does now have a sovereign government and we must respect that the sovereign Iraqi government is taking charge of governing the country."³²

Were the Iraqis right to insist on the death penalty? In a country where penal amnesties are commonplace very few Iraqis have much faith that a custodial sentence would ultimately result in meaningful punishment. This was precisely the experience in Argentina where the democratically elected government of Carlos Menem pardoned and released five leading members of the abusive military juntas which ran the country between 1976 and 1983 only a few short years after their hard won convictions.³³ One can also make an argument that the inclusion of the death penalty is fully consistent with Iraqi criminal justice practice and that it is a regional norm. All Iraq's neighbors, with the relatively recent exception of Turkey,³⁴ retain the death penalty. As Christopher Greenwood notes, attempts to impose European values regarding this question might smack of cultural imperialism: "It is paradoxical that some of those who have been loudest in calling for the early return of sovereignty to the people of Iraq are unwilling to see this element of sovereignty returned at all."³⁵ Certainly one would also wish to avoid the so-called Rwandan paradox where local courts can impose the death penalty for "ordinary" criminal activity but an international court cannot for mass murder.

Such considerations must be weighed against an urgent need to promote international human rights standards in a country where such rights have long been routinely ignored. There is evidence that some Iraqis at least are beginning to reconsider their earlier embrace of capital punishment. In January 2005, Salem Chalabi, one of the principal architects of the IST statute and the first head of the IST, told the *Legal Times*: "If the price of bringing internationals in . . . is removal of the death penalty, we

31. Specifically, Protocol 6 (Abolition of the Death Penalty) and Protocol 13 (Abolition of the Death Penalty in all Circumstances) to the Convention for the Protection of Human Rights and Fundamental Freedoms. Protocol 13 came into force on 1 July 2003.

32. *Saddam Appears Before Iraqi Judge*, BBC News, June 30, 2004, http://news.bbc.co.uk/1/hi/world/middle_east/3852185.stm.

33. PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* 33-34, 93-94 (2001).

34. Turkey abolished the death penalty in August 2002 as part of a package of reforms to enhance the country's eligibility for European Union membership. HUMAN RIGHTS WATCH, *WORLD REPORT 2003* 365 (2003).

35. Greenwood, *supra* note 23, at 21.

should re-examine the death penalty.”³⁶

Conclusion

The International Criminal Court has no temporal jurisdiction over the crimes that occurred under Saddam’s rule.³⁷ Tensions in the Security Council meant that there could be no realistic hope of rallying the necessary support to create an ad hoc tribunal for Iraq. Equally, the strained nature of relations between the U.N. Secretariat and the Bush administration meant that a Special Court in the Sierra Leone model was also likely unattainable. Yet with human rights groups estimating that 250,000–290,000 people had lost their lives,³⁸ the crimes of Saddam Hussein’s regime cried out for justice. The creation of the IST was the only judicial option open to the CPA and it honors the principle enshrined in Article 17 of the Rome Statute of the International Criminal Court that cases should, where possible, be resolved at a local level unless the state in question “is unwilling or unable genuinely” to take this on.³⁹

Political reservations about this process are both inevitable and understandable. It will fall to the IST to answer these reservations by demonstrating its fitness for the task at hand. But neutral parties and those interested in seeing atrocity crimes addressed should at least wish the tribunal well as it struggles to meet high expectations. This is an Iraqi court seeking to address the needs of Iraqi victims and to apply international legal standards. Taken in isolation, whatever your political point of view, it is difficult to see how this could be regarded as a bad thing. Even though this may not be the best case scenario for some, surely it is better than the alternative: deadlock, inaction, and impunity. Every international tribunal established to date has struggled with limitations of one sort or another and yet rightly we persevere. The great lesson of international criminal justice has been that we should not allow the best to become the enemy of the good.

36. Blum, *supra* note 1, at 14.

37. See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 56–59 (2001).

38. HUMAN RIGHTS WATCH, *supra* note 12, at 22.

39. SCHABAS, *supra* note 37, at 67.

